IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
June 19, 2008 Session

PARROTT MARINE SYSTEMS, INC., v. SHOREMASTER, INC., and GALVA FOAM MARINE INDUSTRIES, INC.

Direct Appeal from the Chancery Court for Knox County
No. 165747-2 Hon. Daryl Fansler, Chancellor

No. E2007-02789-COA-R3-CV - FILED AUGUST 21, 2008

In this breach of contract dispute, all parties appeal from the Trial Court's Judgment. We affirm.

Tenn. R. App. P.3 Appeal as of Right; Judgment of the Chancery Court Affirmed.

HERSCHEL PICKENS FRANKS, P.J., delivered the opinion of the Court, in which CHARLES D. SUSANO, JR., J., and SHARON G. LEE, J., joined.

Christopher T. Cain, Knoxville, Tennessee, for appellants.

John O. Threadgill, Knoxville, Tennessee, for appellee.

OPINION

In this breach of contract action, plaintiff sued Shoremaster and Galva Foam Marine Industries, alleging that it was engaged in the business of designing, selling, and installing docking and marinas, and that it had entered into agreements with both defendants regarding selling their products.

Plaintiff alleged that in the summer of 2003, defendants merged into one entity, and asked plaintiff to be a dealer for their products, and to warehouse their materials, and plaintiff agreed, for a monthly compensation of $7,500.00. Plaintiff further alleged that defendants shipped large volumes of equipment, supplies, and materials to plaintiff, and began paying the agreed upon $7,500.00 per month, in return for plaintiff buying and selling defendants' products.

Plaintiff alleged that in November 2004, the defendants stopped making the monthly payments, but plaintiff continued to provide the same services, and incurred great expense. Plaintiff demanded that defendants remove their equipment and materials from plaintiff's property, which defendants finally did. Plaintiff claimed damages as a result of defendants' actions in the amount of $250,000.00.

Defendants' answer admitted that they had an oral agreement with plaintiff who would serve as a distribution center and warehouse for defendants' products. They asserted they were not one entity, and admitted that they agreed to pay $7,500.00 per month in exchange for plaintiff providing certain services.

Defendants averred that on October 8, 2004, they terminated the agreement with plaintiff effective November 30, 2004, because plaintiff stopped paying defendants for their products, and they stopped paying $7,500.00 per month thereafter.

Defendants' counter-claim asserted that on March 22, 2004, plaintiff and Galva Foam entered into a sales agreement for a dock known as the "Dennis Weaver Project - Dock No. 6", and that Galva was to manufacture the dock and plaintiff was to purchase it from Galva. Defendants alleged that plaintiff paid $27,166.00 down on this dock toward the total purchase price of $97,658.00, and that Galva had manufactured the dock, but plaintiff had not taken delivery in violation of the sales agreement. Defendants, in turn, sought judgment of $70,492.00, plus interest and attorneys' fees.

Defendants further alleged that on March 18, 2004, another contract was entered into between plaintiff and Galva, for the manufacture of a dock known as "Dennis Weaver Project - Dock No. 2", and that plaintiff paid $44,829.00 toward the purchase price of $163,792.00. Defendants alleged that in reliance on the agreement, Galva had purchased the materials necessary to build the dock, but plaintiff indicated that it would not accept delivery, and thus had breached this sales agreement as well. Galva sought damages for this alleged breach.

Defendants further alleged that plaintiff had failed to pay Shoremaster for "floor plan" materials and other products ordered by the plaintiff, and owed Shoremaster $98,697.37. Similarly, defendants alleged that plaintiff also owed Galva for "floor plan" materials and other products ordered by plaintiff, in the amount of $151,490.00. Defendants sought these damages from plaintiff.

This case came on for trial on November 16, 2006, and after the Court heard the parties' evidence, it filed a Memorandum wherein the Court determined that there was no written documentation regarding the arrangement between plaintiff and defendants for a "distribution center", but that there were two written contracts concerning the construction of commercial docks. The Court stated that Kirk Parrott was president of Parrott Marine, and that the company was in the business of selling docks and boat lifts, and found that Parrott had owned Choto Marina, and that during that time he bought docks from Galva. The Court determined that in the summer of 2004,

Galva approached Parrott regarding using Parrott's facility as a warehouse, as it wanted to establish a regional warehouse to cover the southeastern US.

The Court observed that Parrott testified that under the proposed agreement, Parrott would store defendants' products, keep the product inventoried, load/unload shipments, do service/warranty work, and occasionally assemble boat lifts. Parrott was to receive $7,500.00 per month, plus an hourly rate for the warranty work, and that the parties had orally agreed to this arrangement.

The Court observed that Parrott testified that plaintiff only ordered items that it had sold, but defendants shipped other items as well. The Court found that everything shipped to plaintiff was posted to plaintiff's account, and that plaintiff never received an invoice for the items, and never saw a floor plan arrangement before this action was filed. The Court found that Parrott would use the parts to service their customers, and also that defendants' dealers would pick up parts and make payment for those directly to defendants, and that Parrott understood that it would receive credit for those payments. The Court held that defendants sent a letter to plaintiff terminating the agreement on October 8, 2004, but defendants did not remove their inventory from plaintiff's facility until July 2005. They stopped making the monthly payments in November 2004. The Court found that plaintiff stopped paying for inventory it sold when defendants stopped paying the $7,500.00 per month, and that no additional inventory was received from defendants after November 2004. The Court found that plaintiff did not sell any of defendants' products after June 2005.

The Court found that Parrott ordered four docks, and that only two were completed and paid for. The Court stated that Parrott testified that the docks were to be constructed one at a time, and they were not supposed to be constructed until he told defendants that they were ready to take delivery. The Court stated that Parrott testified he never told defendants to construct docks 2 and 6 because the customer could not take delivery.

The Court found the parties had an agreement, even though it was not written, and that the agreement was terminated in October 2004, and that defendants chose, for whatever reason, to not pick up their inventory immediately, and that the excuse that plaintiff was demanding further $7,500.00 payments was not convincing, since plaintiff could not have demanded same if the inventory had been picked up in a timely fashion. The Court found that plaintiff was entitled to quantum meruit damages for the storage of the inventory until June 2005, and that plaintiff had suggested that $2,000.00 per month was reasonable, and the Court agreed. The Court found that plaintiff did not purchase the inventory that was shipped, because there were no monthly invoices, and the only accounting done was the monthly inventory by a Mr. Isch. The Court found that Isch did not take into account a June 2005 payment of $25,000.00, and that this was not credited to plaintiff.

The Court found that defendants still held the down payments on docks 2 and 6, which Parrott testified were not supposed to be constructed until he gave them the go ahead. He also testified that he was told by Mr. Peck that those down payments could be refunded. The Court

found that the anticipated profits on the docks were too speculative, because there was no supporting testimony regarding labor/material costs, etc. The Court found that plaintiff owed defendants $117,115.79 for inventory, and should receive a credit against that amount for the $25,000.00 June 2005 payment, for the down payments of $71,995.01 on docks 2 and 6, and for $16,000.00 in quantum meruit storage fees, leaving a balance owed by plaintiff to defendants of $4,120.78.

The Court found Kirk Parrott's testimony credible, and the evidence does not preponderate against the Trial Court's findings of fact. Tenn. R. App. P. 13(d).

Issues presented on appeal are:

1. Whether the Court erred in crediting Parrott with the "initial disbursements" paid on docks 2 and 6?

2. Whether the Court erred in declining to award Galva Foam its lost profits on docks 2 and 6?

3. Whether the Court erred in failing to award Parrott $60,000.00 for warehousing and distributing defendants' materials from October 2004 to July 2005?

4. Whether the Court erred in awarding defendants a judgment based on inventory?

Defendants argue the Trial Court erred in giving Parrott credit for the initial disbursements paid on the contracts for docks 2 and 6, because the contracts did not provide that those would be refunded if the contract was cancelled, and because plaintiff did not clearly ask for those amounts to be refunded/credited at trial. The transcript reveals that these "initial disbursements" were at issue and testimony was elicited regarding same during the trial.

Parrott testified that he never asked for the docks to be built, and that he was told by defendants' representative that he could get the deposits refunded if he sent a letter. Parrott testified that he sent such a letter, but did not receive a refund. The evidence revealed that defendants still had the money, and that they would refund that money if the Court directed them to. There was no dispute that one dock was never built, and the other was built but was being reworked at some cost so that it could be sold to someone else. There was no evidence regarding whether defendants would ultimately suffer any type of loss if that dock was reworked and resold.

As both parties concede, the contracts are silent as to what would happen to those funds if the contracts were canceled. Under these circumstances, we are required to determine the parties' intent. *Planters Gin Co. v. Fed. Compress & Warehouse Co., Inc.*, 78 S.W.3d 885 (Tenn. 2002). As stated, Parrott testified that he was told that he could get a refund of the initial disbursements if the contracts were cancelled, and this was not disputed. We conclude the Trial

Court was correct in allowing plaintiff to receive a credit for these initial disbursements, as the record indicates that defendants did not intend to keep these monies if the contracts were cancelled.

Next, defendants argue the Trial Court erred in failing to award Galva its lost profits on the contracts for docks 2 and 6. The Court found the testimony regarding lost profit was too speculative to be a basis for such an award, because there was no testimony regarding cost of materials, labor, etc., to establish an amount.

Damages based on lost profits have to be established with reasonable certainty. *American Buildings Co. v. DVH Attachments, Inc.*, 676 S.W.2d 558 (Tenn. Ct. App. 1984). Such damages cannot be speculative, but must be based on sufficient proof to allow the court to make a reasonable assessment. *Pinson & Associates Ins. Agency, Inc. v. Kreal*, 800 S.W.2d 486 (Tenn. Ct. App. 1990); *Morristown Lincoln-Mercury, Inc. v. Lotspeich Publishing Co.*, 298 S.W.2d 788 (Tenn. Ct. App. 1956). In this case, the Trial Court held there was not sufficient proof to make a reasonable assessment regarding any potential lost profits, and the evidence does not preponderate against the Court's findings. Tenn. R. App. P. 13(d).

Plaintiff argues that it should have been awarded $60,000.00 for warehousing and distributing defendants' products, which represents $7,500.00 per month until the products were picked up in July 2005. The Court awarded plaintiff $2,000.00 per month for this time period, which the Court said was reasonable quantum meruit damages.

In *Castelli v. Lien*, 910 S.W.2d 420, 427 (Tenn. Ct. App. 1995), this Court said:

> Quantum meruit actions are equitable substitutes for contract claims. They enable parties who have provided goods and services to another to recover the reasonable value of these goods and services when the following five circumstances exist: (1) there must be no existing, enforceable contract between the parties covering the same subject matter; (2) the party seeking recovery must prove that it provided valuable goods and services; (3) the party to be charged must have received the goods and services; (4) the circumstances must indicate that the parties involved in the transaction should have reasonably understood that the person providing the goods or services expected to be compensated; and (5) the circumstances must also demonstrate that it would be unjust for the party benefitting from the goods or services to retain them without paying for them.

This Court went on to state: "Liability under quantum meruit is based on a legally implied promise to pay a reasonable amount for goods or services received." *Id.*

We hold plaintiff was due some measure of quantum meruit damages for continuing to store and distribute these products after the oral agreement was terminated. Defendants received a benefit from plaintiff's actions, and the Court's determination of $2,000.00 per month was a reasonable amount, and the evidence does not preponderate against that finding. Tenn. R. App. P.

13(d).

Finally, plaintiff argues the Trial Court erred in awarding a judgment for defendants based on the inventory, because there was no proof that plaintiff agreed to buy these items. Contrary to this assertion, however, Parrott testified that the arrangement was that Parrott would pay for items that were deemed to have been sold pursuant to the inventories done by Isch, and that was the parties' method of operation during the time that the agreement was in effect. We conclude this issue is without merit.

For the foregoing reason, we affirm the Trial Court's Judgment in all respects and assess the cost of the appeal one-half to the plaintiff and one-half to the defendants**.**

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HERSCHEL PICKENS FRANKS, P.J.